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IN THE

Supreme Court of the United States

October Term 1969

No. 348

CLARA L. WASHINGTON,
Petitioner

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Finis E. Cowan
Joe R. Greenhill, Jr.
Counsel for Respondent
1600 Esperson Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

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OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals (App. of Petition) is reported at 436 S.W.2d 554. The Texas Supreme Court without written opinion approved the holding of the Court of Civil Appeals, refusing the application of writ of error with the notation, writ refused, no reversable error.

JURISDICTION

If this Court had jurisdiction to review the judgment of the Texas Court of Civil Appeals it would have jurisdiction only under 28 U.S.C. § 1257(3). However, this Court has no jurisdiction because petitioner's application for writ of certiorari was not timely filed with this Court. Petitioner's motion for rehearing was denied by the Texas Supreme Court on April 16, 1969. Petitioner's application

for writ of certiorari was not filed with this Court until July 16, 1969, ninety-one (91) days later. Petitioner's failure to file his application within ninety (90) days of the judgment below as required by 28 U.S.C. § 2101(c) and Rule 22(3) of this Court deprives this Court of jurisdiction. *Rust Land & Lumber Co.* v. *Jackson*, 250 U.S. 71, 76 (1919)

QUESTION PRESENTED

Was the Texas Court of Civil Appeals correct in holding that, under the Texas decisions, petitioner is not entitled to relief by bill of review from the judgment of February 24, 1966?

STATEMENT

This case involves a prior suit on a policy of insurance in which respondent moved for summary judgment. (App. of Petition) On January 31, 1966, attorneys for petitioner and respondent appeared before the trial court for a hearing on respondent's motion. (App. of Petition) The trial court heard evidence in the form of affidavits and argument of counsel on the merits and announced that it would grant the motion. (App. of Petition) Up to this time petitioner had not raised any objection to the Court's proceeding with the hearing. (App. of Petition) However, later the same day petitioner filed a multi-headed motion in which she claimed that the Court should not have proceeded with the hearing on the respondent's motion for summary judgment because petitioner had not had the 10 days notice of hearing provided by the Texas Rules of Civil Procedure and that summary judgment was improper as a matter of substantive law. (App. of Petition) On February 24, 1966, judgment that the petitioner take nothing by reason of her suit against respondent was signed and entered, and petitioner then attempted to perfect an appeal to the Court

of Civil Appeals for the First Supreme Judicial District of Texas. (App. of Petition)

Respondent moved the Court of Civil Appeals to dismiss the appeal for want of jurisdiction because of late filing of petitioner's appeal bond. (App. of Petition) On July 7, 1966, the Court of Civil Appeals filed a written opinion holding that it had acquired no jurisdiction because of late filing of petitioner's appeal bond and ordering the appeal dismissed for lack of jurisdiction. *Washington* v. *Golden State Mutual Life Ins. Co.*, 405 S.W. 2d 856 (Tex. Civ. App. 1966). (App. of Petition)

Petitioner then applied to the Supreme Court of Texas for a writ of error and on November 9, 1966, that Court filed a written opinion approving the opinion and the holding of the Court of Civil Appeals in refusing the application for writ of error. *Washington* v. *Golden State Mutual Life Ins. Co.*, 408 S.W.2d 227 (Tex. 1966). Under Texas law this amounted to affirmance of the action of the Court of Civil Appeals in dismissing the appeal for lack of jurisdiction. The merits of the appeal again were not reached. (App. of Petition)

Petitioner then applied to this Court for writ of certiorari and on April 17, 1967, certiorari was denied. *Washington* v. *Golden State Mutual Life Ins.. Co.*, 386 U.S. 1007, rehearing denied, 387 U. S. 938 (1967).

On January 29, 1968 petitioner filed the present suit, seeking by means of bill of review to have the trial court set aside its judgment of February 24, 1966, that petitioner take nothing by reason of her suit against respondent. (App. of Petition) Respondent on April 30, 1968 again moved for summary judgment, and on June 3, 1968, the trial court granted respondent's motion for summary judgment, denying petitioner's request for bill of review. (App.

of Petition) Petitioner perfected an appeal to the Court of Civil Appeals for the Fourteenth Supreme Judicial District.

The Texas Court of Civil Appeals affirmed the judgment of the trial court, holding that petitioner's failure to perfect an appeal from the judgment of February 24, 1966 defeated her right to a bill of review. (App. of Petition)

Petitioner then applied to the Supreme Court of Texas for a writ of error. The Texas Supreme Court, without filing a written opinion, approved the holding of the Court of Civil Appeals, refusing the application for writ of error with the notation, writ refused, no reversable error.

On April 16, 1969, petitioner's motion for rehearing was overruled by the Texas Supreme Court and on July 16, 1969, the petition for writ of certiorari was filed in this Court.

REASONS FOR NOT GRANTING THE WRIT

1. The case presents no substantial federal question. Petitioner in this suit asked the Texas courts by means of a petition for bill of review to start all over again and retry questions which had already been litigated in her prior suit. Petitioner does not object on constitutional grounds to the action taken by the Texas courts denying her petition for bill of review. Rather, petitioner asks this Court to correct an alleged error made by the trial judge in her prior suit against respondent. Petitioner claims that although her attorney participated in the hearing on respondent's motion for summary judgment in the prior suit conducted on January 31, 1966 without making any objection to the Court's proceeding, the trial court denied her due process and equal protection of the laws by proceeding when there was a claimed problem of

notice not raised by petitioner until after the hearing was concluded. Petitioner here reasserts this claim despite the fact that the Texas appellate courts could acquire no jurisdiction of her appeal from the district court judgment in the prior case because of the late filing of her appeal bond, and despite the fact that this Court has already once determined that it did not wish to review petitioner's claim. This is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308 (1902).

2. The judgment of the Texas Court of Civil Appeals rests on adequate and independent state grounds within the meaning of this Court's decision in *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945). The rule is well settled in Texas that in order to set aside a final judgment by means of a bill of review, the complaining party must allege and prove a meritorious cause of action which she was prevented from asserting by the extrensic fraud or wrongful act of the opposite party, unmixed with any fault or negligence on her own part, *E.g., French* v. *Brown,* 424 S.W. 2d 893, 895 (Tex. 1967); *Hanks* v. *Rosser,* 378 S.W. 2d 31, 34 (Tex. 1964); *Alexander* v. *Hagedorn,* 226 S.W. 2d 996, 998 (Tex. 1950). The Court of Civil Appeals affirmed the trial court's denial of petitioners' request for a bill of review, by applying the established state rule to the case and holding that petitioner's negligence in failing to perfect an appeal from the judgment of February 24, 1966, defeated her right to a bill of review.

Petitioner does not attack the Texas requirements for bill of review nor does she contend that Texas courts have failed to uniformly apply these requirements to all Texas litigants. Indeed the judgment of the Texas Court of Civil Appeals on the bill of review issue is not challenged by a petitioner at all. What petitioner does is ask this Court (for

the second time in a little more than two (2) years) to review the judgment of the Supreme Court of Texas on the same question of State law which petitioner sought to review on the prior application for writ of certiorari in this Court. Thus, petitioner, not only asks review in this Court on a question of State law, she also asks review of the same question of State law which this Court has declined to review before, and which by no stretch of the imagination could be before this Court on this application. What is before this Court on this application is a request that this Court review the unchallenged judgment of the Texas Court of Civil Appeals on the question of Texas requirements for bill of review actions. It is well settled that state courts speak with final authority on State law questions, *e.g.*, *Scripto, Inc. v. Carson,* 362 U.S. 207,210 (1960); *Murdock* v. *Memphis,* 87 U.S. (20 Wall.) 590 (1875), and that there can be no review if the state court has decided the case exclusively on some ground of State law and has never reached a federal question present in the case. *McCoy* v. *Shaw,* 277 U.S. 302, 303 (1928).

CONCLUSION

For these reasons the petition for writ of certiorari should not be granted.

Finis E. Cowan
Joe R. Greenhill, Jr.
Counsel for Respondent